PRESTON CORP. SDN. BHD.

v.

EDWARD LEONG NIM FAY & ORS.

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 13 OF 1978]
13 JANUARY & 5 MARCH 1982

CONTRACT: *Interpretation - Whether valid offer and acceptance regarding ownership of film positives - Trade usage - Principles governing existence of trade usage - Importance of reasonableness.*

The appellants were a company carrying on the business of publishing books, and the respondents were a firm of printers. The parties entered into a business relation in 1970 regarding the printing of school text books. The respondents sent the appellants two bills; one for printing charge and another for extra charges for reproducing the film positives. The appellants paid all the printing charges except a disputed sum of RM500 which they claimed to be an overcharge by the respondents and a further sum of RM28,052 as extra charges for reproducing the film positives because the respondents claimed ownership of those films. The respondents contended that if the appellants wanted ownership, they had to pay not only the agreed extra charges but also another sum equivalent to 80% of the reproducing charges.

Finally the respondents sued the appellants for the sum of RM500 and the extra charges for reproduction of the film positives. They pleaded that they were entitled to the ownership of the film positives because of the express terms of the contract between them to that effect and because of a trade usage prevalent in the printing industry. Harun J, who heard the case in the first instance gave judgment in favour of the respondents on both the sums claimed with interest and costs without at the same time ordering the delivery of film positives to the appellants. The appellants appealed.

Held:

[1] On whether the appellants were bound to pay the sum of RM500, the judge's finding and order were clearly erroneous and would not be supported by evidence as he took no account at all of the admissions made by the respondents that the disputed sum was an overcharge.

[2] On whether the respondents were entitled to the payment for the extra charges without giving up ownership of the film positives to the appellants:

(A) Where the express terms of the contract entitled the respondents to the ownership of the film.

(i) The quotation of prices by the respondents, in respect of which the appellants subsequently issued printing orders, did not constitute binding offers which resulted in a contract.

The first quotation contained certain expressions on the part of the respondents but none of the expressions constituted a claim that the reproduced film positives would belong to the respondents. All that was meant by the expressions was that extra charges would be borne by the appellants in reproducing film positives.

The second, third and fourth quotations contained a note to the effect that the film positives were to remain the property of the respondents. However, the first two were merely written in response to the appellants' inquiry and therefore did not constitute a binding offer. Further, in all three quotations the ownership claim was made only as footnote or within parenthesis, thereby indicating that the note was not intended to be even part of the quotation and appeared as if it was a half hearted attempt to claim such ownership.

The fifth quotation contained no such specification. In any case, the inclusion or omission of such clause in the quotations was completely immaterial. It would have been different if the appellants' printing orders had contained that clause.

(ii) The parties must be taken to have entered into contracts on the terms of the printing orders, on the dates they were confirmed by the respondents. Each printing order constituted an offer which is the first of the two constituent elements in the formation of a contract, and its confirmation by the respondents constituted acceptance which contracted a contract between them. As none of the printing orders contained any film ownership clause such clause therefore could not form a part of the contract between the parties.

(B) ***Whether ownership could be claimed on the basis of trade usage:***

(i) *Existence of a trade usage*

In view of the analysis by the Court of all the evidence there did not seem to exist with a reasonable degree of probability a trade usage that film positives reproduced by printers were their property. It was for the respondents to show that there was a trade usage by which reproduced film positives belong to printers who reproduce them, although their costs are borne by their customers.

The Court was not satisfied that the alleged trade usage was sufficiently proved. The Court was entitle to assess and analyse the evidence in order to see, assuming that the question of credibility is not disputed, whether the evidence was sufficient to establish the fact intended to be proved, as, though the question regarding the existence of trade usage is a question of fact for the trial Judge to decide, the Judge in the case before the Court had supplied no written grounds on the matter.

(ii) *Reasonableness*

The basis of the alleged usage seemed unreasonable as it conflicted with the ordinary sense of justice commonly understood by reasonable men in that a person who pays for an article or for making it should be entitled to it and not be deprived of its ownership for which he has paid or is required to pay. Furthermore, the alleged usage is completely unilateral as it does not take into consideration the mutual interest of the printers' customers, be they publishers or others. By the usage a printer would obtain ownership without any consideration at all on his part and it certainly extended beyond the need to protect his business interest. If the need to retain the films was for the purpose of protecting such interests, it would be sufficient for a printer to hold them as bailee, without having to own them, and so use them as long as he was required to print for his customers.

Per curiam: (i) Trade usage is defined "as a particular course of dealing or line of conduct generally adopted by persons engaged in the particular department of business life" (*Halsbury's* 4th Edn., Vol. 12, p. 28). Its characteristics are notoriety, certainty and reasonableness.

(ii)"The issue of reasonableness has a bearing upon the question of existence or otherwise of an alleged trade usage, because no one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable and because a person can only be assumed to have acquiesced in a reasonable usage. (*Neilson v. James* [1882] 9 QBD 546 at 552; *Scott v. Irving* [1830] 1B & Ad 605 at 612)

(iii)The test of reasonableness is whether a reasonable, honest and right-minded person considered the usage concerned to be fair and proper. A usage which outrages the sense is not reasonable. (*Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co Ltd*. [1916] 2 KB 206 at 298 & 301; *Gibbon v. Pease* [1905] 1 K.B. 810; *Ex parte Horsfall* [1827] 7 B & C 528)

[Appeal allowed with costs.]

Cases referred to:
Neilson v. James [1882] 9 QBD 546
Scott v. Irving [1830] 1 B & Ad 605; 109 ER 912
Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co Ltd [1916] 2 KB 296
Gibbon v. Pease [1905] 1 KB 810
Ex parte Horsfall [1827] 7 B & C 528; 108 ER 820

Other Sources referred to:
Halsbury's Laws of England Vol. 12 4th Edn., p. 28

For the appellant - R.R. Sethu; Azman, Davidson
For the respondent - Cyrus V. Dass; Shook Lin & Bok

JUDGMENT

Salleh Abas FJ:

This is another appeal in which Counsel for both sides argued and we were called upon to decide without the benefit of written grounds of judgment of the trial Judge.

The Facts

The appellants are a company carrying on the business of publishing books and have offices in Kuala Lumpur and Singapore and are also associated with another company called Times Educational Co. Sdn. Bhd. The respondents are a firm of printers carrying on business at No. 538, MacPherson Road, Singapore. Between March 1970 and September 1971 the parties entered into a business relationship regarding the printing of school text books. This relationship would have continued beyond that period, had it not been for irreconcilable differences between them concerning ownership of certain film positives, which were used in the printing of those books. The respondents sent the appellants two bills; one bill for printing charges and another bill for extra charges for reproducing the film positives.

The appellants paid all the printing charges except a disputed sum of RM500 which they claimed to be an overcharge by the respondents. They withheld payment of the extra charges for reproducing the film positives because the respondents claimed ownership of these films. The respondents refused to give up their claim for ownership contending that the films were theirs and that if the appellants wanted ownership, they had to pay not only the agreed extra charges for reproducing them, but also another sum equivalent to 80% of the reproduction charges. A suggestion by the appellants that the respondents could keep the film positives as long as they would continue to print the appellants' books coupled with appellants' assurance to continue to employ the respondents as their printers did not satisfy the respondents. They still insisted that the film positives belonged to them. Because of this insistence the annual printing contract which the parties were negotiating did not come through and as a result the appellants changed their printers and refused to pay the respondents the agreed reproduction charges.

Finally the respondents sued the appellants claiming the sum of RM500 which they alleged was the balance of the printing charges and a further sum of RM28,052 as extra charges for reproducing the film positives whose ownership was disputed. The respondents pleaded that they were entitled to the ownership of the film positives because of the express terms of the contract between them to that effect and also because of a trade usage prevalent in the printing industry. The appellants on the other hand denied that the contract contained such terms and they also denied the existence of the alleged trade usage. As regards the claim of the sum of RM500 the appellants alleged that this was an overcharge.

Harun J who heard the case in the first instance, gave judgment in favour of the respondents on both these sums and therefore ordered the appellants to pay a total sum of RM29,552 at 6% interest and costs without at the same time ordering the delivery of film positives to the appellants. Hence the appellants appealed against this decision.

The Issues

There are two issues in this case. The first one is whether or not the appellants were bound to pay the disputed sum of RM500 to the respondents, whilst the second issue is whether the respondents were entitled to the payment for the extra charges, i.e. reproduction charges without giving up ownership of these film positives to the appellants.

The First Issue

As regards the first issue we are of opinion that the learned Judge's finding and order were clearly erroneous and cannot be supported by evidence as he took no account at all of the admissions made by the respondents that the disputed sum was an overcharge.

The sum of RM500 arose out of the printing of books 3, 4 and 5 of Bahasa Malaysia Sukatan Pelajaran Baharu. The respondents claimed that there was an undercharge of RM450 in respect of Book 3 and RM25 each in respect of Book 4 and Book 5, thus making a total of RM500 as undercharge. On that basis, the respondents issued a debit note of RM500 to the appellants. The appellants on the other hand claimed that there was an overcharge because the respondents in their computation did not follow the agreed quoted prices. Under cross-examination by Mr. Sethu for the appellants the managing partner of the respondents' firm (PW1) admitted that his firm overcharged the appellants by RM545 each in respect of Book 4 and Book 5. He added:

> *I agree there is now no basis for the debit note of RM25 for Book 4 and RM25 for Book 5.*

On 3 July 1971, the appellants were presented with a bill amounting to RM7,150 for ten thousand copies of Book 3 at the agreed rate of 70.5 cents per book. Later the respondents increased the amount by another RM450 because, they claimed, the books contained 196 pages instead of 184 pages. The appellants disputed this extra sum saying that the respondents' price calculations at 0.367 cent per one page (AB98) were untenable and that the computation at the rate of 0.341 cent per page would be the correct calculation (AB83A). Under cross-examination PW1 once again conceded that the appellants' calculations were correct, and also said:

> The final prices arrived at we conceded on agreeing to AB 83A
>
> ...
>
> We conceded through our solicitors to cut the matter short
>
> ...

I conceded on the defendant company's working in Book 3 - to settle the matter.

(AB 83A) is the appellants' calculation.

Thus it is clear that there is no justification for the learned trial Judge to find the claim of the disputed sum of RM500 in favour of the respondents, and so we decide the issue in favour of the appellants.

The Second Issue

We now turn to the next issue. Film positives were needed in order to print the text books concerned, and these were not supplied by the appellants, and so the respondents were required to make them by using existing text books which were supplied to them by the appellants. For this work the appellants were charged RM28,052. The appellants were willing to pay this sum on the understanding that the reproduced film positives were recognised as belonging to them, but the respondents on the other hand insisted that in any event, irrespective of payment of this sum or not, they were the owners of the films and that they would not part with the ownership unless they were paid an extra 80% of the reproduction charges. The ownership was claimed on the basis of express terms of the contract and also trade usage. We must look at the contract.

When did the Contract come into existence?

The contract in this case was formed by an exchange of letters commencing with the respondents' quotations and ending with the payment for the printed books. Between 19 April 1971 and the date of termination of correspondence between the parties, i.e. 28 September 1971, there were five quotations submitted by the respondents in respect of which appellants subsequently issued printing orders. It was the submission of Counsel for the respondents that as these quotations were accepted without qualification and as the quotations, at least the first three, contained film ownership clause, the appellants must therefore be bound by this clause; such clause having been incorporated as part of the contract.

In our view this submission would be correct if every quotation submitted by the respondents constituted a binding offer which when accepted by the appellants by the issuing of relevant printing order resulted in a contract between them. Thus the question we have to ask ourselves is this: Were the parties *ad idem* when the quotations were accepted or did these quotations constitute binding offers? Because if they were not, no contract between the parties could come into existence at the moment when the appellants' printing orders were issued, but did so only at the time when these orders were confirmed or accepted by the respondents.

An offer is an intimation of willingness by an offeror to enter into a legally binding contract. Its terms either expressly or impliedly must indicate that it is to become binding on the offeror as soon as it has been accepted by the offeree. Yet an examination of all the quotations in this case did not seem to express such intention. They were nothing more than a mere supply of information by the respondents in response to the appellants' inquiry as to the price of books to be printed and their delivery dates. Altogether there were five quotations which are as follows:

(1) First quotation dated 19 April 1971 (AB 3, 4, 5 and 6)

(2) Second quotation dated 3 May 1971 (AB13)

(3) Third quotation dated 3 May 1971 (AB30)

(4) Fourth quotation dated 28 May 1971 (AB20 and 21)

(5) Fifth quotation dated 31 May 1971 (AB23 & 24)

However, one year before the first quotation was submitted the respondents apparently in response to an inquiry made by the appellants submitted a quotation in respect of the printing of Developmental Readers for Singapore Book 6 and Objective Geography Book. This quotation (AB1 and 2) did not result in any contractual relation between them as there was no follow-up. But the quotation is relevant for the purpose of determining the intention of the respondents when issuing their quotations to their customers. This quotation was couched in the following language:

Koon Wah Lithographers

9 March 1970.

The Preston Corp. Sdn. Bhd.
6, Jalan 13/6, Petaling Jaya,
Selangor, West Malaysia.

Attention: Mr. Lee Kah Sing

Dear Sir,

We thank you for your enquiry and have the pleasure in submitting our quotation for the printing and supply of,

A: Developmental Readers for Singapore
Bk. 6
Size: 5½ x 8½

...

...

...

Extras: Initial costs for monofilm settings and colour separation from your materials and articles supplied, at S$3,075

...

B: Objective Geography Book
Size: 5½ x 8½

...

...

...

Extras: Initial costs for monofilm settings and stripping on Map's illustrations. The lot for S$1,500.

...

All prices quoted are at Net and subject to final confirmation upon receipt of your order.

We hope our quotation will meet with your kind approval.

Yours faithfully,
Koon Wah Lithographers
Sgd.
Leong Jee
Proprietor.

It is clear that the opening words, "we thank you for your inquiry and have pleasure in submitting our quotation for the printing and supply of ..." and the concluding sentences "all prices quoted are net and subject to final confirmation upon receipt of your order" and "We hope our quotation will meet with your kind approval" do not indicate and were never intended to be a binding offer so that acceptance of the quotation would result in a contract between them. Our view is that this quotation was merely a supply of information or an invitation to enter into a contract.

The language of the first quotation dated 19 April 1971, was even more brief as it said:

> We are submitting our quotations on the enclosed schedule. We hope our quotations will meet with your approval and assure of our closest co-operation.

In our view this wording does not indicate an intention to treat the quotation as a binding offer. The enclosed schedule attached thereto has three pages and each page contains three common specifications of which Specification No. 3 is described on pp. 1 and 2 as "Reproduced positive will be charged extra"; and on p. 2 as "Publisher will supply an original book for reproduction, all positives done by us will be charged extra.

In our view none of these expressions constitute a claim that the reproduced film positives would belong to the respondents. All that was meant by the expressions was that extra charges would be borne by the appellants in reproducing film positives. Thus even if the first quotation were to be regarded as a binding offer so that its acceptance by the appellants in issuing their first printing order would amount to a contract, the film ownership clause was certainly not part of the contract.

We now turn to the second and third quotations (AB12 and AB13). These two quotations were both dated 3 May 1971 and related to the printing of Sukatan Pelajaran Buku 3, 4, 5 and 6 and the New Syllabus English Book 1A and 1B. Both quotations were couched in identical language as follows:

> Dear Sir,
>
> We thank you for your inquiry and have pleasure in submitting our quotation for the printing and supply of, ... We hope our quotation meets your approval.
>
> Yours faithfully,
> **Koon Wah Lithographers**
> Sgd.
> **Edward Leong**
>
> **Please note:** All film positives and colour separation will remain our property; however your copyright will be observed.

Again in our view these quotations were merely written in response to the appellants' inquiry as the opening words said so and therefore did not constitute a binding offer. It is also observed that this was the first time that the respondents attempted to claim ownership of the film positives but it is curious to note that such claim was not placed in the body of the quotation but only as its footnote thereby indicating that this note was not intended to be even part of the quotation and appeared as if it was a half hearted attempt to claim such ownership.

The fourth quotation dated 28 May 1971, relates to the printing of New Series Work Book 1A, 1B, 2A and 2B, 3, 4, 5 and 6. This quotation said:

> We are submitting our revised quotations on the enclosed schedule. We hope our quotations will meet your approval and assure you of our closest co-operation.

Thanking you,

Yours faithfully,
Koon Wah Lithographers
Sgd.
Edward Leong

The quotation schedule attached to the letter also contains common specification No. 3 which was "all reproduced positives will be charged extra (all film positives and colour separation will remain our property; however your copyright will be observed)." This was the second time when film ownership was claimed, but as we have stated earlier the quotations were not binding offers the clause claiming film ownership therefore did not form part of the contract.

The fifth quotation dated 31 May 1971, (AB23 and 24) said:

> We are submitting our quotations on the enclosed schedule. We hope our quotations will meet with your approval and assure you of our closest co-operation.
>
> Thank you
>
> Yours faithfully,
> **Koon Wah Lithographers**
> Sgd.
> **Edward Leong**

In the quotations schedule the common specification No. 3 was dropped. Mr. Dass for the respondents submitted to us that it was no longer necessary to include this specification as it was already accepted in earlier quotations. Our answer to that submission is that this specification could not form part of the contract because none of the quotations constituted a binding offer, which would result in the formation of a contract upon the issuing of printing orders by the appellants. The inclusion or omission of such clause in the quotations are completely immaterial. It would have been different if the appellants' printing orders contain this clause.

We would now examine the printing orders. There were altogether six printing orders (though Counsel said there were only five). Every one of these orders has two dates: the date of order and date of confirmation. Date of order is the date on which the printing order was made and the date of confirmation is the date on which the respondents confirmed or accepted the order. In our view the date of confirmation was the date on which contractual relationship between the parties began because the offer in the context of offer and acceptance necessary for the formation of a contract was the printing order and not the quotation. As there are six printing orders, each of which was confirmed there ought to be six separate contracts altogether. The printing orders are:

(1) First printing order (AB 7, 8 & 9)
Date of order : 20 April 1971
Date of confirmation : 20 April 1971

(2) Second printing order (AB15)
Date of order : 3 May 1971
Date of confirmation : 3 May 1971

(3) Third printing order (AB 147)
Date of order : 15 May 1971
Date of confirmation : 29 May 1971

(4) Fourth Printing order (AB 22)
Date of order : 28 May 1971
Date of confirmation : 29 May 1971

(5) Fifth printing order (AB 33 - AR 154)
Date of order : 20 June 1971
Date of confirmation : 12 July 1971

(6) Sixth printing order (AB55 - AR 176)
Date of order : 2 July 1971
Date of confirmation : 28 June 1971

It is clear from these printing orders that the contracts were concluded between the parties not on the date of the orders but on the date of their confirmation which was either on the same date or subsequently, except in the sixth printing order when the date of confirmation was four days earlier than the date of the order, but this could be explained by the fact that the order was made verbally and that the written order was issued subsequently.

In our judgment each printing order constituted an offer which is the first of the two constituent elements in the formation of a contract, and its confirmation by the respondents constituted acceptance which concluded a contract between them. Our view is supported by the fact that after the first printing order was issued on 20 April 1971, the respondents by a letter dated 23 April 1971, (AB10) wrote to the appellants confirming the order as follows:

> Dear Sir,
>
> We thank you for your letter dated 24 April 1971, and wish to further confirm our reduction rates as follows:
>
> ...
>
> ...
>
> We assure you of our co-operation in meeting your production schedule.

In our view this letter is the respondents' confirmation of the appellants' first printing order thereby concluding a printing contract between them. As none of the printing orders which were confirmed by the respondents contained any film ownership clause, such clause therefore could not form a part of the contract between the parties.

As regards the sixth printing order the date of the confirmation was four days earlier than the date of the order itself. This anomaly was, however, explained by the respondents' letter dated 2 July 1971, (AB55A - AR177) to the effect that the order was made orally and that a subsequent written order was made for record purposes. This letter said:

> Further to our conversation between your Mr. Kong and our Mr. Chan on 30 June 1971, this is to confirm that specification of the two books which are now in production following Mr. Chan's earlier verbal order.

The two books referred to in the printing order and the letter were The New Syllabus English for Singapore Book 2A and Book 2B.

As the starting point in the formation of contracts between the parties was the printing orders because these orders were offers, their confirmation by the respondents ergo constituted acceptance and therefore brought into existence contracts between them. Consequently the film ownership clause contained in the quotations was completely irrelevant and as such formed no part of the contracts at all. The parties must have been taken to enter into contracts on the terms of the printing orders and not on the terms of the quotations submitted by the respondents.

Trade Usage

The next question now is whether the respondents can claim ownership of these film positives on the basis of trade usage. Usage has been defined:

> as a particular course of dealing or line of conduct generally adopted by persons engaged in the particular department of business life, or ... as a particular course of dealing or line of conduct which acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary; that is to say that a rule of conduct amounts to a usage if so generally known in the particular department of business life in which the case occurs that, unless, expressly or impliedly excluded, it must be considered as forming part of the contract. (*Halsbury's Laws of England* Vol. 12, 4th Edn., at p. 28).

The characteristics of usage are notoriety, certainty and reasonableness.

In the present case it is for the respondents to show that there is a trade usage by which reproduced film positives belong to printers who reproduce them, although their reproduction costs are borne by their customers. The respondents called two witnesses to prove trade usage. One witness Mr. F.V. Rajendra (PW3) who testified to that effect was himself not a printer. He was merely an officer of the Master Printers Association of Singapore, being its executive secretary. The association is a trade union of employers in the printing industry. Before he became executive secretary of this trade union, Mr. Rajendra was a labour officer serving as an industrial relations officer. As he was not himself a printer but merely an officer of a trade union we cannot place much reliance upon his claim of knowing the existence of the alleged trade practices. In any case he cited no instances in which such usage was acted upon. Thus his evidence amounts to no more than a mere claim of the existence of the alleged trade usage without himself participating in the trade or citing a concrete case in which the alleged usage was acted upon.

The next witness to prove the alleged trade usage was Mr. R.K. Panikar (PW4) who was himself a printer having his own printing business in Petaling Jaya and was also the Vice President of the Master Printers Association of Malaysia, an association established under the Societies Act. According to Mr. R.K. Panikar his own practice was to charge the customers the costs of reproducing film positives by the inclusion of such costs in a final bill and to retain the film positives on the basis that they belong to the printers and are therefore not released to the customers even though they paid for reproducing them. He testified that the question of ownership was raised in the committee meeting of the association held on 28 May 1975, i.e. almost four years after the event in the present case. How therefore could such trade usage affect or be incorporated in the agreements which took place some four years previously is difficult to understand. But with regard to the decision of the committee, surely it is not binding upon third parties and its adoption by members will not make any difference either, as the decision is not a legislative act. Mr. R.K. Panikar said that he was very flexible in dealing with his customers. If requested, he would release the film positives to his customers either free of charge or subject to certain payment depending upon the degree of his relationship with the particular customers concerned. It seems to us therefore that Mr. Panikar's evidence does not show clearly that there was such a trade usage. It was nothing more than a mere compliance by printers who were members of the Master Printers Association with the collective decision of their association. We cannot see how a decision of the association and its compliance by members would have the force of law, unless it gains such notoriety as to amount to usage.

The appellants led evidence claiming that they had no knowledge of such usage and therefore cannot be bound by the alleged usage. Mr. Kon Thean Soong (DWS), the Managing Director of the appellants, who had been in the publishing business since 1964, i.e. some six years before the event in this case said that he did not know of the existence of such a trade usage. We cannot find any reason to doubt the credibility of his evidence on this point. They must have engaged a number of printers in the course of their business. If there was such a trade usage one would expect the appellants' managing director who had been in business for some time to know it.

Mr. Ong Aik Beng (DW1) was the Financial Controller of Toppan Printing, a multi-national operating in several countries, including Singapore. He gave evidence to the effect that Toppan printed books for the appellants and that film positives reproduce by Toppan were released to the appellants' without any extra payment, other than the costs of making these films and that there was no arrangement between his company and the appellants with regard to these film positives and that his company recognised the appellants as their owner. Although DW1 was not a printer, as a Financial Controller in such a large printing company he would certainly know the practice of this company in Malaysia and Singapore. The fact that Toppan is a multi-national does not necessarily mean that anyone can assume in the absence of any evidence to the contrary, that Toppan has acted differently from the standard practice adopted by local printers, - i.e. they chose not to adopt the alleged trade usage.

The appellants' next witness on the subject was Mr. Koh Lean Chong (DW3) who was the manager of Far East Offset and Engraving Sdn. Bhd. at Kuala Lumpur. He said that he made film positives for the appellants at certain charges and did not claim ownership of such films. Admittedly DW3 was not a printer, but his evidence is relevant as it tends to show how and in what direction justice and commonsense operate. It goes in the direction of the maxim: he who pays for the job is entitled to the job's end product.

However, in view of our analysis of all this evidence there does not seem to exist with a reasonable degree of probability a trade usage that film positives reproduced by printers are their property. There is no evidence that the decision of the Master Printers Association was accepted by those in the printing industry, meaning not only printers but also publishers and other customers. We appreciate that the question as to whether a particular trade usage exists or not is a question of fact for the trial Judge to decide; but as the learned Judge in this case supplied no written grounds on the matter, we are entitled to assess and analyse the evidence in order to see, assuming that question of credibility is not disputed, whether the evidence was sufficient to establish the fact intended to be proved. In this case we are not satisfied that the alleged trade usage was sufficiently proved.

Reasonableness of Usage

To establish their claim based on the alleged trade usage, the respondents must show that as a matter of law the alleged usage is reasonable; because no particular line could be held to be a trade usage nor could it exist as a trade usage unless it is reasonable. The issue of reasonableness has a bearing upon the question of existence or otherwise of an alleged trade usage because no one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable and because a person can only be assumed to have acquiesced in a reasonable usage. *Neilson v. James* [1882] 9 QBD 546, 552 and *Scott v. Irving* [1830] 1 B & Ad 605, 612; 109 ER 912.

The test of reasonableness is what a reasonable, honest and right-minded person considers the usage concerned to be fair and proper. A usage which outrages the sense of justice and commonsense is not reasonable: *Produce Brokers Co. Ltd. v. Olympia Oil and Cake Co. Ltd* [1916] 2 KB 296, 298, & 301. The test therefore is one which refers to the normal and ordinary value judgment of a reasonable man.

In this case the alleged trade usage was claimed to be for the protection of printers' interest fearing that the release of these film positives to their customers would prejudice the printers' business as other printers could be engaged to do the printing work without making new film positives but by using the ones made by previous printers. Thus both Mr. Rajendra (PW3) and Mr. Panikar (PW4) said that film positives were jealously guarded by printers. In our view the basis of the alleged usage seems unreasonable because it conflicts with the ordinary sense of justice commonly understood by reasonable men in that a person who pays for an article or for making it should be entitled to it and not be deprived of its ownership for which he has paid or is required to pay. Furthermore this alleged usage is completely unilateral as it does not take into consideration the mutual interest of printers' customers; be they publishers or others. By this usage a printer obtains ownership without any consideration at all on his part and it certainly extends beyond the need to protect his business interest. If the need to retain these films is for the purpose of protecting such interests surely it would be sufficient for a printer to hold them as a bailee without having to own them and to use them as long as he is required to print for his customer. This is apparently what the appellants were prepared to agree, but rejected by the respondents. In their letter dated 1 July 1971, AB49/AR171 the appellants wrote to the respondents stating that the latter could keep these film positives on their premises as long as they continued to print for the appellants and that the appellants assured them of their printing orders. But nay, the respondents wanted more than mere protection. They wanted to make an extra profit by selling back the film positives to the appellants at a price of 80% of their reproduction costs. We cannot therefore hold that such an attitude and practice are reasonable as to constitute a trade usage binding upon the appellants.

Mr. Dass for the respondents submitted that there is no rule of law saying that he who pays is entitled to what he pays for. Whilst we agree that there is no express statement to that effect, such a statement is certainly obvious as the system of common law is based on the concept of what is fair. There is no express statement to that effect, because it is unnecessary to say so. For example, an architect who was commissioned and paid to draw plans for repairing a house was held in *Gibbon v. Pease* [1905] 1 KB 810 not entitled to the property in the plans after the work had been executed because such an alleged usage was unreasonable and so the architect was compelled to hand over the plans to his client who paid him the stipulated fees. Similarly in *Ex parte Horsfall* [1827] 7 B & C 528; 108 ER 820 an alleged usage entitling a solicitor to keep working papers used in preparation for writing a deed which he was instructed by his client to make was held to be unreasonable and therefore the working papers had to be surrendered to his client. Surely architects and solicitors are required to exercise as much art and skill in the preparation of plans and deeds as printers are in reproducing film positives and making colour separation. If the assertion by architects to keep their plans and by solicitors to keep their working papers as belonging to them could not be held to be reasonable, justice and commonsense must equally dictate that printers' claim of ownership of reproduced film positives is also unreasonable.

Before we conclude this judgment we wish to advert to four invoices issued by the respondents which contain the film ownership claim in the following words:

> NB All film positives and colour separations will remain our property; however, your copy right will be observed.

These invoices are:

(1) K/71/5/211 dated 26 May 1971 for S$3,501 (AB18 and AB51)

(2) K/71/5/211 dated 26 May 1971 for S$11,566 (AB52)

(3) K/71/6/247 dated 15 June 1971 for S$2,405 (AB53)

(4) K/71/6/251 dated 19 June 1971 for S$464 (AB54)

The appellants objected to the invoices because of the note and would not settle the amounts unless the note was deleted. As a result of a meeting held in the respondents' office in Singapore on 19 June 1971, to discuss a number of matters, such as the possibility of long term printing arrangements between the parties, outstanding accounts and film ownership, the respondents issued four fresh invoices without the objected note in place of the earlier ones which were subsequently returned by the appellants with the word "cancelled" written across the documents as they treated film ownership claim by the respondents as settled as a result of this meeting. These four fresh invoices are:

(1) AB19/39

(2) AB38

(3) AB40/29

(4) AB41/32

What transpired at this meeting, as there were no minutes kept, could be gauged by the ensuing correspondence between the parties and the conflicting evidence given on their behalf at the trial. The respondents claimed that the issue of these four fresh invoices without the objected note was for the purpose of expediting payment and not to be taken as abandoning their claim on film positives; whilst the appellants on the other hand maintained that the omission of the note was a waiver of such claim by the respondents. Whatever differences there may be between them as to what transpired at the meeting on 19 June 1971, in our view, these are no longer relevant because of our conclusion in this case that the film ownership claim by the respondents was not part of the contract between the parties nor was it established as a trade usage. The evidence relating to issue of the fresh invoices and the Singapore meeting would only be relevant if we have held otherwise, because in that event waiver would become relevant to the appellants' defence and these circumstances may well have a bearing on the question of waiver.

For the reasons stated above we are of the view that the judgment of Harun J must be reversed and that the appeal should be allowed with costs. Our order therefore is that the respondents' claim for the sum of RM28,552 and interest thereon is dismissed and that the deposit should be refunded to the appellant.

Also found at [1982] CLJ 302